

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PATRICIA ANN ALEA,	)	
	)	No. CV-11-193-JPH
Plaintiff,	)	
	)	ORDER GRANTING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	
MICHAEL J. ASTRUE, Commissioner	)	
of Social Security,	)	
	)	
Defendant.	)	
	)	
	)	

---

BEFORE THE COURT are cross-motions for summary judgment. ECF No. 12, 14. Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney Daphne Banay represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 6. After reviewing the administrative record and the briefs filed by the parties, the court **grants** Plaintiff's Motion for Summary Judgment, **ECF No. 12, and reverses and remands** for further administrative proceedings.

**JURISDICTION**

Plaintiff applied for disability insurance benefits (DIB) on April 23, 2008, alleging disability as of April 16, 2003 (Tr. 127-28). The application was denied initially and on reconsideration (Tr. 72-74, 81-82). Alea alleged disability due to hearing and back problems (Tr. 157).

1 Administrative Law Judge (ALJ) R. J. Payne held a hearing on  
2 September 9, 2009. Plaintiff, represented by counsel, and experts  
3 Ronald Klein, Ph.D., and Kendrick Morrison, M.D., testified (Tr.  
4 32-64). On September 18, 2009, the ALJ issued an unfavorable  
5 decision (Tr. 17-24). The Appeals Council denied review on April  
6 15, 2011 (Tr. 1-5), making the ALJ's decision the final decision  
7 of the Commissioner appealable to the district court. 42 U.S.C.  
8 § 405(g). Alea filed this action for judicial review on May 17,  
9 2011. ECF No. 1, 4.

#### 10 STATEMENT OF FACTS

11 The facts have been presented in the administrative hearing  
12 transcript, the ALJ's decision, and the briefs of the parties.  
13 They are only briefly summarized here.

14 Alea was 47 years old at the hearing. She lived with her  
15 spouse and ten year old daughter (Tr. 46). She graduated from high  
16 school and has worked as a bank teller, audit clerk, and at a  
17 sandwich shop. She last worked part-time in a sandwich shop, until  
18 June 2009, about three months before the hearing (Tr. 48, 50-51,  
19 57-58, 158).

20 In April 2003, she suffered a back injury at work. Since then  
21 Alea has had problems with her back "going out" (Tr. 49). When  
22 this happens, she immediately goes to the chiropractor (Tr. 50).  
23 Alea moved to Spokane from Las Vegas in August 2006 (Tr. 48, 52).  
24 She has well documented hearing loss in both ears. She uses  
25 hearing aids which help somewhat, and reads lips, but is unable to  
26 hear using a regular telephone (Tr. 50-53, 184). Alea takes  
27 prescribed medication when her back goes out, and for anxiety, as  
28 needed (Tr. 55-56). She can walk for 20 minutes and sit for 30

(Tr. 59). Alea goes to her daughter's school. She usually uses a motorized cart at the grocery store. She dislikes going out alone because she feels anxious (Tr. 57, 60).

#### SEQUENTIAL EVALUATION PROCESS

The Social Security Act (the Act) defines disability as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act also provides that a Plaintiff shall be determined to be under a disability only if any impairments are of such severity that a plaintiff is not only unable to do previous work but cannot, considering plaintiff's age, education and work experiences, engage in any other substantial gainful work which exists in the national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B). Thus, the definition of disability consists of both medical and vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001).

The Commissioner has established a five-step sequential evaluation process for determining whether a person is disabled. 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person is engaged in substantial gainful activities. If so, benefits are denied. 20 C.F.R. §§ 404.1520(a)(4)(i), 416.920(a)(4)(i). If not, the decision maker proceeds to step two, which determines whether plaintiff has a medically severe impairment or combination of impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

If plaintiff does not have a severe impairment or combination

1 of impairments, the disability claim is denied. If the impairment  
2 is severe, the evaluation proceeds to the third step, which  
3 compares plaintiff's impairment with a number of listed  
4 impairments acknowledged by the Commissioner to be so severe as to  
5 preclude substantial gainful activity. 20 C.F.R. §§  
6 404.1520(a)(4)(iii), 416.920(a)(4)(iii); 20 C.F.R. § 404 Subpt. P  
7 App. 1. If the impairment meets or equals one of the listed  
8 impairments, plaintiff is conclusively presumed to be disabled.  
9 If the impairment is not one conclusively presumed to be  
10 disabling, the evaluation proceeds to the fourth step, which  
11 determines whether the impairment prevents plaintiff from  
12 performing work which was performed in the past. If a plaintiff is  
13 able to perform previous work, that Plaintiff is deemed not  
14 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
15 this step, plaintiff's residual functional capacity (RFC)  
16 assessment is considered. If plaintiff cannot perform this work,  
17 the fifth and final step in the process determines whether  
18 plaintiff is able to perform other work in the national economy in  
19 view of plaintiff's residual functional capacity, age, education  
20 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
21 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

22 The initial burden of proof rests upon plaintiff to establish  
23 a *prima facie* case of entitlement to disability benefits.  
24 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
25 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
26 met once plaintiff establishes that a physical or mental  
27 impairment prevents the performance of previous work. The burden  
28 then shifts, at step five, to the Commissioner to show that (1)

1 plaintiff can perform other substantial gainful activity and (2) a  
2 "significant number of jobs exist in the national economy" which  
3 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
4 Cir. 1984).

#### 5 STANDARD OF REVIEW

6 Congress has provided a limited scope of judicial review of a  
7 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
8 the Commissioner's decision, made through an ALJ, when the  
9 determination is not based on legal error and is supported by  
10 substantial evidence. See *Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
11 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
12 "The [Commissioner's] determination that a plaintiff is not  
13 disabled will be upheld if the findings of fact are supported by  
14 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
15 Cir. 1983)(citing 42 U.S.C. § 405(g)).

#### 16 ALJ'S FINDINGS

17 The ALJ found plaintiff was insured through September 30,  
18 2012 (Tr. 19). At step one, he found Alea engaged in substantial  
19 gainful activity after onset, but worked at less than SGA levels  
20 in May and October 2008 (Tr. 19). At steps two and three, he found  
21 Alea suffers from a history of back complaints, with only mild  
22 disc protrusions, and moderately severe bilateral sensorineural  
23 hearing loss, impairments that are severe but do not meet or  
24 medically equal a Listed impairment (Tr. 20, 22). The ALJ found  
25 anxiety is not a severe impairment. He also found Alea not  
26 entirely credible (Tr. 23). ALJ Payne assessed an RFC for a range  
27 of light work, with the option to sit/stand at will and  
28 "limitations/restrictions for activities requiring normal/adequate

1 hearing, such as using the telephone" (Tr. 22). At step four,  
2 without taking a vocational expert's testimony, the ALJ found Alea  
3 is able to perform past relevant work as an audit clerk and bank  
4 teller (Tr. 23). Accordingly, the ALJ found plaintiff has not been  
5 disabled as defined by the Social Security Act at any time from  
6 onset through the date of his decision (Tr. 24).

#### 7 **ISSUES**

8 Plaintiff alleges the ALJ erred when he weighed the evidence  
9 and assessed her credibility. ECF No. 13 at 8-9.

10 The Commissioner answers that although the ALJ erred when he  
11 failed to give reasons for rejecting Dr. Van Wey's opinion, the  
12 error is harmless because it did not affect the result. ECF No. 15  
13 at 7-9. The Commissioner asserts the ALJ took into account the  
14 medical expert's testimony regarding plaintiff's limitations  
15 stemming from hearing loss by incorporating them into the assessed  
16 RFC. ECF No. 15 at 9-10. The Commissioner asserts plaintiff's  
17 remaining allegations with respect to the assessed RFC need not be  
18 considered by the court because they are not based on any  
19 identified "credible substantial evidence." ECF No. 15 at 10-11.  
20 Finally, the Commissioner responds that the ALJ gave specific,  
21 clear and convincing reasons for finding Alea less than fully  
22 credible. ECF No. 15 at 12-17. The Commissioner asks the court to  
23 affirm, or to remand for further administrative proceedings. ECF  
24 No. 15 at 16-18.

#### 25 **DISCUSSION**

##### 26 **A. Standards for weighing opinion evidence**

27 In social security proceedings, the claimant must prove the  
28 existence of a physical or mental impairment by providing medical

1 evidence consisting of signs, symptoms, and laboratory findings;  
2 the claimant's own statement of symptoms alone will not suffice.  
3 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
4 on the basis of a medically determinable impairment which can be  
5 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
6 medical evidence of an underlying impairment has been shown,  
7 medical findings are not required to support the alleged severity  
8 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cir.  
9 1991).

10 A treating physician's opinion is given special weight  
11 because of familiarity with the claimant and the claimant's  
12 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-605 (9<sup>th</sup> Cir.  
13 1989). However, the treating physician's opinion is not  
14 "necessarily conclusive as to either a physical condition or the  
15 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
16 751(9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
17 treating physician than an examining physician. *Lester v. Chater*,  
18 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). Correspondingly, more weight is  
19 given to the opinions of treating and examining physicians than to  
20 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
21 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
22 are not contradicted, they can be rejected only with clear and  
23 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
24 ALJ may reject an opinion if he states specific, legitimate  
25 reasons that are supported by substantial evidence. See *Flaten v.*  
26 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
27 1995).

28 In addition to the testimony of a nonexamining medical

1 advisor, the ALJ must have other evidence to support a decision to  
2 reject the opinion of a treating physician, such as laboratory  
3 test results, contrary reports from examining physicians, and  
4 testimony from the claimant that was inconsistent with the  
5 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
6 751-752 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-1043 (9<sup>th</sup>  
7 Cir. 1995).

8 **B. Dr. Van Wey**

9 Jennifer Van Wey, Psy.D., evaluated plaintiff in June 2008  
10 and diagnosed generalized anxiety disorder and rule out depressive  
11 disorder. She assessed a GAF of 70, indicating mild problems or  
12 symptoms, and excluding medical ailments (Tr. 533-38). Plaintiff  
13 was working part-time, twelve hours per week, since September 2007  
14 in a sandwich shop (Tr. 535).

15 Alea told Dr. Van Wey her anxiety originally began due to a  
16 divorce at age 26 (Tr. 534). Dr. Klein opined it was unclear from  
17 the record "what was maintaining the anxiety over time" (Tr. 44).  
18 Alea reported taking paxil and attending weekly counseling for  
19 three years, in the past. Her physician referred her for  
20 counseling three months before the evaluation "but she did not  
21 know who to call." She has had three to four panic episodes a  
22 month for 20 years (Tr. 534). Dr. Van Wey opined Alea has  
23 "probable success" for long-term, *part-time employment*, as Dr.  
24 Klein observed (Tr. 44)(emphasis added). After Dr. Klein reviewed  
25 the record he opined plaintiff's anxiety is non-severe (Tr. 45).

26 The Commissioner admits the ALJ erred when he failed to  
27 provide any reasons for discounting Dr. Wey's opinion, but asserts  
28 the error is harmless because it did not affect the result in this



1 case. ECF No. 15 at 9.

2 The court disagrees. Had the ALJ accepted Dr. Van Wey's  
3 opinion Alea could only work part-time based on her mental  
4 impairment alone, he may have found her disabled.

5 The ALJ gave greater weight to the reviewing psychologist's  
6 opinion than to the examining psychologist's, and this was error.  
7 *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup> Cir. 2004). Moreover,  
8 it is the ALJ's responsibility to give specific, legitimate  
9 reasons for discrediting an examining professional's opinion. See  
10 *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1992);  
11 *Magallanes v. Bowen*, 881 F.2d 747, 751-752 (9<sup>th</sup> Cir. 1989).

12 An error is harmless if the ALJ would have reached the same  
13 result or substantial evidence still supports the decision. *Molina*  
14 *v. Astrue*, 674 F.3d 1104, 1115 (9<sup>th</sup> Cir. 2012). In this case the  
15 decision is not supported by substantial evidence and is based on  
16 errors of law. In addition to failing to properly credit or reject  
17 Dr. Van Wey's opinion that even with treatment plaintiff is only  
18 capable of part-time work, the ALJ erred at step four.

19 **C. Step four**

20 The ALJ assessed an RFC for a limited range of light work and  
21 concluded Alea is able to perform past work as a bank teller and  
22 audit clerk. The RFC assessed included the requirements of an "at  
23 will" sit/stand option and undefined "limitations/restrictions for  
24 activities requiring normal/adequate hearing, such as using the  
25 telephone" (Tr. 22).

26 Although the burden of proof lies with the claimant at step  
27 four, the ALJ still has a duty to make the requisite factual  
28 findings to support his conclusion. *Pinto v. Massanari*, 249 F.3d

1 840, 844 (9<sup>th</sup> Cir. 2001), citing SSR 82-62. *See also* 20 C.F.R. §§  
2 404.1571 and 416.971, 404.1574 and 416.974 and 416.965. This is  
3 done by looking at the "residual functional capacity and the  
4 physical and mental demands" of the claimant's past relevant work.  
5 *Pinto*, 249 F.3d at 844-45, citing 20 C.F.R. §§ 404.1520(e) and  
6 416.920(e). The claimant must be able to perform the actual  
7 functional demands and job duties of a particular past relevant  
8 job, or the functional demands and job duties of the occupation as  
9 generally required by employers throughout the national economy.  
10 SSR 82-61. This requires specific findings as to the claimant's  
11 residual functional capacity, the physical and mental demands of  
12 the past relevant work, and the relation of the residual  
13 functional capacity to the past work. SSR 82-62.

14 There is no evidence that a person with plaintiff's RFC could  
15 perform the work of a bank teller and audit clerk, either as  
16 actually or generally performed. The record shows plaintiff had  
17 increasing difficulty on the job due to her hearing impairment  
18 when she worked as a bank teller. The ALJ assessed an RFC with  
19 non-exertional limitations: the need to change positions at will,  
20 and a vague limitation caused by her hearing impairment. The  
21 failure to call upon a vocational expert was error. *Tackett v.*  
22 *Apfel*, 180 F.3d 1094, 1102 (9<sup>th</sup> Cir. 1999). On remand the ALJ will  
23 consult a vocational expert if necessary.

#### 24 **D. Credibility**

25 Credibility determinations bear on evaluations of medical  
26 evidence when an ALJ is presented with conflicting medical  
27 opinions or inconsistency between a claimant's subjective  
28 complaints and diagnosed condition. *See Webb v. Barnhart*, 433 F.3d

1 683, 688 (9<sup>th</sup> Cir. 2005). The ALJ considered Alea's failure to  
2 obtain counseling when he weighed her credibility. While an  
3 *unexplained* failure to obtain or follow medical treatment  
4 diminishes credibility, *Fair v. Bowen*, 885 F.2d 597, 603 (9<sup>th</sup> Cir.  
5 1989), Alea explained she had not followed up on some treatment  
6 "due to the inability to afford it" (Tr. 22). On remand the ALJ  
7 should re-evaluate credibility.

8 On remand the ALJ will conduct a new hearing, perform new  
9 steps two through four (and five if necessary) of the sequential  
10 evaluation, reassess plaintiff's residual functional capacity, re-  
11 evaluate plaintiff's credibility, and consider a vocational  
12 expert's testimony if necessary.

13 The court wishes to make clear that it expresses no opinion  
14 as to what the ultimate outcome on remand will or should be.  
15 "[Q]uestions of credibility and resolution of conflicts in the  
16 testimony are solely functions of the Secretary." *Sample v.*  
17 *Schweiker*, 694 F.2d 639, 642 (9<sup>th</sup> Cir. 1981).

#### 18 CONCLUSION

19 Having reviewed the record and the ALJ's conclusions, this  
20 court finds that the ALJ's decision is not supported by  
21 substantial evidence and is based on errors of law.

#### 22 IT IS ORDERED:

23 1. Plaintiff's Motion for Summary Judgment, **ECF No. 12**, is  
24 **GRANTED**. The case is **REVERSED and REMANDED** for further  
25 administrative proceedings.

26 2. Defendant's Motion for Summary Judgment, **ECF No. 14**, is  
27 **DENIED**.

28 3. Requests for attorney fees may be filed by separate

1 motion.

2 The District Court Executive is directed to file this Order,  
3 provide copies to counsel for the parties, enter judgment in favor  
4 of Plaintiff, and **CLOSE** the file.

5 DATED this 17th day of January, 2013.

6  
7 s/ James P. Hutton  
8 JAMES P. HUTTON  
9 UNITED STATES MAGISTRATE JUDGE  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28